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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1121

LENA ESDERTS, Administratrix of the Estate of WILLIAM J. ESDERTS, Deceased,

Petitioner,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

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Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

Petitioner, Lena Esderts, Administratrix of the Estate of William J. Esderts, Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, entered in this cause, denying petitioner leave to appeal a judgment of the Illinois Appellate Court, First District.

OPINION BELOW.

The opinion of the Appellate Court of Illinois appears as an appendix to this Petition and is reported at 76 Ill. App. 2d 210, 222 N.E. 2d 117. The Illinois Supreme Court, at a time when it was composed of but five judges, instead of the constitutionally provided seven man court, denied Petition for Leave to Appeal. Four judges, under the Illinois Constitution, are required to obtain such an order.

JURISDICTIONAL STATEMENT.

Judgment in the Appellate Court was entered on July 14, 1966. A petition for leave to appeal was denied by the Illinois Supreme Court on November 30, 1966 (R. 9), and the judgment became final on that date. The jurisdiction of this Court is invoked under Sections 1257(3) and 2101(c), Title 28, United States Code, providing for review by this Court by writ of certiorari where a right is specifically granted under the statutes of the United States. The federal rights claimed in this case and involved in the questions presented herein arise under the Federal Employer's Liability Act. Title 45, Section 51, et seq., United States Code.

QUESTIONS PRESENTED.

1. Can an intermediate Illinois court of review, prior to a consideration of grave trial errors conclude "that it was not unreasonable for the jury to reach the conclusion that it did" and thereupon pass over matters which, according to established Illinois law were erroneous, as recognized by the Appellate Court itself, and still be conducting itself within its confines determined by this Court in the *Rogers* doctrine? (*Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 507)

2. Can a trial court, in an action under the Federal Employer's Liability Act, be permitted to nullify the rights created by that Act by its method of conducting the trial? Specifically, although the state court law prohibits statements admitted in evidence for the purpose of impeachment to go to the jury room, can another trial court recall the jury from their deliberations and read the purported impeaching statements of that eye witness, notwithstanding the well-established principles in the trial of cases in Illinois, as found by the court of review, that statements do not go to the jury room? Can this be done, notwithstanding the specific finding of the Appellate Court, *infra*, p. 14a, that the defendant was at fault in not completing the alleged impeachment and that it, as well as the court, should not have told the jurors that they would have the statements in the jury room?

3. Can a trial court, in an action under the Federal Employer's Liability Act, inject itself into the actual trial of the case and yet conform to the mandates of this Court as to its function?

4. In an action under the Federal Employer's Liability Act, can a railroad be allowed to argue venue, contributory negligence as a defense, the doctrine of respondeat superior, and other matters directly contrary to the Act itself?

5. Is a litigant seeking a review from an adverse decision of the Illinois Appellate Court to the Supreme Court of Illinois constitutionally deprived of this right when, although the Illinois Constitution, Article VI, Section 4, provides that the Supreme Court shall consist of seven judges, there are two vacancies and but five sitting, when, under the Illinois Constitution, the concurrence of four judges is necessary in order to obtain a Petition for Leave to Appeal?

STATEMENT OF THE CASE.

The witness, Peet, and plaintiff's decedent, a foreman of a bridge repair crew, were travelling on a motor car in a westerly direction in defendant's yard in Iowa. Peet was seated on the left hand side of the car, facing south. Decedent was on the right hand side of the car turned partially sideways looking up the tracks to the west. (Abst. 31)(*)

It was a bright, clear day with the sun obstructing vision somewhat. The car was being operated at a speed of about five miles per hour. (Abst. 31, 36) A switch engine moving in the opposite direction on several tracks over to the north passed the motor car. Peet turned around and waved to one of the engine crew. Just as he turned back from so waving, the motor car struck something on the track (later ascertained to be a derail device) and left the rail. Peet and the decedent were thrown from the car to the ground and the car came to rest on the top of decedent.

There are some misstatements in the Appellate Court opinion. Thus, it states "They then proceeded westward on the switch track, the car being run backwards contrary to the rules of the railroad." *Infra,* page 2a. It was undisputed that Esderts was seated on the right hand side of the car facing west, the direction in which the car was moving. (Abst. 31)

The opinion states, "Derails were painted yellow . . ." *Infra,* p. 3a. Peet, after the occurrence noticed the de-

(*) The abstract is on page 3 of the Illinois Supreme Court Record filed in this Court with this petition.

rail and testified it looked "just like the track" rather than the customary yellow. (Abst. 132) According to defendant's own records, the derail and the derail sign were painted on June 6, 1952, the day after the occurrence, and the day on which certain pictures were taken by respondent. (Abst. 14)

The Appellate Court also states there was a dispute concerning the legibility of the sign noting a derail, whether the sign needed painting and whether it was obscured somewhat. *Infra,* p. 4a. But, according to respondent's records, the section foreman painted the derail sign after the accident and the weeds were cut after the occurrence. (Abst. 14)

Peet's Statements.

On June 6, 1952, the day after the occurrence, Peet, the only eye witness, gave a written statement to an investigator for defendant. This was marked defendant's Exhibits 4A, B and C for identification. (Abst. 37) Five years after the occurrence, on October 10, 1957, investigators for defendant sought out Peet in Colorado Springs, Colorado and took a second statement, marked defendant's Exhibit 11 for identification. (Abst. 50) The contents of neither document were admitted into evidence during the course of the trial. During the arguments, the respondent's counsel read excerpts from the statements and the Court told the jury that the statements would be with them in their jury room. The judge also made remarks to the same effect.

When the jury retired, respondent asked that the statements go to the jury room. Petitioner specifically objected and cited the Illinois Authorities to the effect that an out of court statement of a witness never goes to

the jury. The Appellate Court agreed that Illinois law is that documents admitted for the purpose of impeachment cannot be taken to the jury room and that the trial judge was in error when he made the statements in question, *infra* p. 18a. While counsel were arguing this question, the jury requested the particular statements, noting their absence from the other exhibits given them. (Abst. 190) The court ruled they would go to the jury.(*) The statements contained many conclusions. The trial court, itself, noted "A lot of them are horrible, Jim." (Abst. 195)

After the jury had retired to deliberate on the verdict, the trial court recalled them and read Peet's out of court statements to them.(**).

The Appellate Court states that plaintiff stipulated to the reading of the statements to the jury. The opinion ignores the fact that plaintiff's counsel was given a choice of two errors. The Court ruled that the statements would go to the jury room in their entirety, although filled with conclusions and matters which could not in any wise be admissible, or it would recall the jury from its deliberation and, itself, read the statements.

(*) "The Court: *All right, these will go to the jury.*
"Mr. Dooley: Don't you want to hear these cases?
"The Court: Not now. We are going to have to decide this. Later.
"Mr. Dooley: This is something here. We have gone on here for two weeks. I didn't do anything to cause these to go to the jury room. I didn't do anything. He offered them. He should have read them. We didn't do anything here. It would be a serious error to prejudice the plaintiff by these.
"The Court: It is going to be a serious question either way." (Abst. 192) (Emphasis supplied)

(**) For the convenience of the Court, the entire colloquy between the court and counsel is attached to this petition as an appendix, *infra,* pages 21-36.

FOREWORD.

This Court has repeatedly warned both trial and courts of review that whether employer negligence played any part at all in the injury or death is the single inquiry and that "judges are to fix their sights primarily to make that appraisal, and if the test is made, are bound to find that a case for the jury is made whether or not the evidence allows a choice of other possibilities." (*Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 507). But, the Appellate Court considered its function was to determine whether or not the verdict to the jury was or was not reasonable.(*)

If a court of review, when called upon to pass upon errors, can, itself, make a determination as to the reasonableness of the verdict and upon that conclusion, permit grave departures from the established method of trying

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(*) "It is our opinion from reading the entire record that it was not unreasonable for the jury to reach the conclusion that it did. The evidence, although in conflict, was sufficient for the jury to find that no negligence of the railroad contributed wholly or partially to Esderts' injury and death." (Infra, p. 5a)

Obviously, the Appellate Court has adopted the argument made by defendant in its brief. It is captioned thus:

"The jury's verdict was the only possible one under the evidence. The judgment entered on it should be affirmed." (Def. App. Ct. Br., p. 12)

To this proposition, defendant devoted more than one-half of its brief in the Appellate Court, as a certified copy thereof attests.

A certified copy of said brief and 15 Xerox copies thereof are filed herewith as Petitioner's Exhibit A.

cases within the state then, it has exceeded the power given it by this Court.

Although this Court has repeatedly defined the arena of the court and the jury in cases brought under this federal act, nonetheless, if trials are to be conducted under it so that the rights afforded by the statute are purely abstract, then realities have not been met. This Court has become aware of how the method of trial of cases can affect the remedy which is part and parcel of the statute. (See *Eichel* v. *New York Central R. Co.* 375 U.S. 253)

This case should be taken so that there will be a pronouncement by this Court that the powers of a trial court in an action under this statute apply not only to the question of whether a verdict should be directed, but likewise to the method of procedure. Indeed, the latter can more effectively be deprivative of a remedy than a motion to direct a verdict, if this Court will review only the conduct of courts on directing or setting aside verdicts.

An Illinois intermediate appellate court cannot take it upon itself to determine whether or not the verdict is or is not reasonable and, upon that predicate, conclude that departures from well-established trial practices in the state should be overlooked.

This Court has stated time and again what the function of trial and review courts is. Nonetheless, notwithstanding these mandates, there have been constant violations throughout the country on matters affecting the conduct of the trial. Obviously, when an Illinois intermediate court of review determines whether there is error on the basis of its evaluation of the jury verdict, then, of

course, it is violating the directive of the *Rogers* case. That directive is that courts are only to ascertain whether employer negligence played any part, even the slightest, in producing the injury or death and that it is a jury issue whether there is a choice of other possibilities.

The administration of this Act of Congress should be the same in state courts as in federal courts. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359. The Act is not to be administered in a patchwork fashion. *Buffalo R. Co.* v. *Ahern*, 344 U.S. 367. Moreover, it is the rule in the federal system that when there is an erroneous ruling, which relates to the substantial rights of the party, it is ground for reversal, unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless* v. *United States*, 298 U.S. 342, 347, 348.

Obviously, there cannot be a different test for prejudicial error in state courts from that of federal courts, and a uniform administration of the Act possible.

ARGUMENT.

THE TRIAL COURT NULLIFIED THE RIGHTS CREATED BY A FEDERAL STATUTE BY ITS MODE OF CONDUCTING THE TRIAL; IT DID THIS JUST AS EFFECTIVELY AS IF IT HAD DIRECTED A VERDICT.

The trial court, in what is still an adversary proceeding (*Hickman* v. *Taylor,* 329 U.S. 495), injected itself into this litigation so as to prejudice the plaintiff. As the Appellate Court found, the trial court improperly stated to the jury that the statements which were never read in evidence would be with them in their jury room. Defendant, as found by the Appellate Court, did not complete the impeachment as required by law, *infra,* p. 14a. After the cause had been submitted to the jury with all proofs closed, the trial court, when objections were made to the statements going to the jury room (a) held that they would go to the jury room notwithstanding they contained many conclusions and (b) told plaintiff's counsel that if he didn't want them to go to the jury room, he would recall the jury and read them. (Abst. 190, 191, 195)

No litigant coming into the courts should ever be presented with the choice of errors. It would admittedly have been error to send the statements of the only witness to the jury room. There is no precedent for recalling a jury and emphasizing to them the statements of an out-of-court witness admitted for impeachment.

All Illinois authorities hold it error to allow statements of a witness to go to the jury room. *Nordhaus* v. *Marek,* 317 Ill. App. 351, 367; *Nelson* v. *N. W. Elevated R. Co.,* 170 Ill. App. 119, 122; *Rawson* v. *Curtiss,* 19

Ill. 456, 479, 480; 57 A.L.R. 2d 1019; *People* v. *Spranger,* 314 Ill. 602, 612; *West Frankfort* v. *Marsh Lodge,* 315 Ill. 32, 38; *Johnson* v. *N. K. Fairbank Co.,* 156 Ill. App. 381, 388.

Certainly the trial court confronted plaintiff with a choice of two errors; either he would let the statements go to the jury room, or he would recall the jury and read the statements, striking out the conclusions. Whatever he did was error chargeable not to plaintiff, but to the defendant and the trial court itself, as the Appellate Court opinion recognizes.

But there is more. It is fundamental under Illinois procedures that whether the matters sought to be introduced are impeaching is a matter of law which first has to be passed upon by the trial court. (*Reilly Tar & Chemical Co.* v. *Lewis,* 326 Ill. App. 84) Of course, petitioner was deprived of this right under the compulsory process of the court.

Secondly, the plaintiff was prohibited from offering matter in explanation on rebuttal there—a right he would have had if the so-called impeaching statements were properly introduced. *Hirsch & Sons Iron Co.* v. *Coleman,* 227 Ill. 149, 153.

But the Appellate Court attempts to pass off an invasion of this substantial right with these words:

> "The plaintiff complains that she was precluded from challenging the impeaching character of the items in exhibits 4 and 11 and from offering explanatory evidence concerning them. But there was no offer of proof in this regard and, furthermore, she neither challenged nor offered rebuttal explanation to those questions and answers in exhibit 12 which were

identical to the ones in exhibits 4 and 11." *Infra,* p. 16a.

The plaintiff could possibly make no offer of proof, since there was no offer of the impeaching portions, nor any attempt to read the statements during the taking of evidence. How could we make an offer of proof to meet a matter which was never introduced in evidence until after the final arguments?

Thirdly, the effect of the court's ruling was to admit evidence, permissible solely for the purpose of attacking the credibility of the witness, to be treated as substantive evidence. Impeachment is a process designed to aid in ascertaining the degree of credit due a witness. (*Brown* v. *Luehrs,* 1 Ill. App. 74, aff'd 95 Ill. 195.) As said in Cleary, Handbook of Illinois Evidence, sec. 3.15, p. 39:

> "An inconsistent statement by a witness is not substantive evidence and its effect is limited to impairing the credibility of the witness. *Smith* v. *Pelz,* 384 Ill. 446, • • •."

This procedure, of course, involved substantial rights. It was the objective of the respondent to discredit the only eye witness.

In the mechanics of the trial of a lawsuit, we submit that a fair trial was not possible under this bizarre proceeding.

Respondent's argument was highly prejudicial and an invasion of a substantial right.

Respondent argued to the jury thus:

> "You know, this happened out there in Iowa and people in that area know the conditions there much better than we do. If the plaintiff in this case had a

lawyer out there in Iowa you couldn't convince any group of residents around that area that there would be any four and a half foot weed growth.

Mr. Dooley: I object to that.

The Court: Sustained. The jury will disregard that statement.

Mr. Rush: You are asked to do that.

Mr. Dooley: I move to strike that out, if Your Honor please.

The Court: You are asked to know what the natives wouldn't know. Sustained.

Mr. Rush: You are asked to believe there would be such a growth in this case.

The Court: Very well. The statement in reference to the natives in Iowa, what they would or would not believe, that is stricken and the jury will disregard that argument." (Supp. Abst. 30, 31)(*)

Thus, the statement was: "If the plaintiff in this case had a lawyer out there in Iowa, you couldn't convince any group of residents around that area that there would be any four and a half foot weed growth." The court sustained an objection. Counsel for the defendant thereupon repeated what had been sustained by stating to the jury that they were "asked to do that." There was then a motion by plaintiff to strike it out, and the court sustained the motion and, himself, repeated it. As if that were not enough, counsel, for the third time, repeated the statement in defiance of the court's order, and the court, himself, again told the jury to disregard the argument and, himself, repeated it. Thus, on five different occasions—three by counsel, notwithstanding the court's

(*) The Supplemental Abstract is at page 4 of the Illinois Supreme Court Record filed in this Court.

rulings, and two by the court in sustaining the rulings—was this improper argument repeated.

This was an argument to the triers of fact on a matter with which they had no concern, namely, a matter of law, the propriety of maintaining the action in Cook County with a Chicago lawyer.

Title 45, section 56, U.S.C.A., entitled "Actions; limitations; concurrent jurisdiction of courts" provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

In the *Second Employers' Liability Cases,* 223 U.S. 1, this court specifically held that when Congress, in the execution of a power confided to it by the Constitution, adopts an act, it speaks for all the people and all the States, and thereby establishes a policy for all, and the courts of a State cannot refuse to enforce the act on ground that it is not in harmony with the policy of that State.

It is well established that the option given by this section is "substantial." See: *Hohler* v. *Pennsylvania Railroad Company,* 140 F. Supp. 487, 489.

The question of venue is a question of law, not an issue of fact. We do not contend that the doctrine of *forum non conveniens* does not apply to Federal Employers' Liability Act cases, but this matter was not in the case and, if it were, a decision by the court would not be appealable to the jury.

It is fundamental that matters of law are not the proper subject matter of argument. If such were the fact, counsel could tell the jury the statutory limit for death cases in Illinois and Iowa, although this action was brought under the Federal Employers' Liability Act, or, in a personal injury action, state to the jury the statutory limit for a wrongful death action.

That constant repetition of argument held by the court to be improper is in itself grounds for a new trial is well established.

In *Peters* v. *Chicago Rys. Co.*, 307 Ill. 202, it was said at p. 208:

> We have had occasion heretofore to remind attorneys that it will not be possible for them to reap any benefit for their clients by such arguments. We dislike very much to have to reprimand counsel or to penalize their clients for their misconduct, but we shall not hesitate to do so where it appears probable that they have unfairly obtained a verdict for their client by their misconduct. The judgments of the Appellate Court and the Superior Court in this case are reversed solely upon that ground, and the cause will be remanded."

To the same effect see *Mattice* v. *Klawans*, 312 Ill. 299, 304.

Again, in its argument defendant stated:

> "There is no question about it. Now, say that someone else, say, Mr. Peet, was injured on this or they had two other men. Say your son was working for the Rock Island—
>
> Mr. Dooley: That is objected to.
>
> The Court: Sustained.
>
> Mr. Rush: Say anyone was on that car.
>
> Mr. Dooley: Objection.
>
> The Court: Sustained.

Mr. Rush: Anyone was on that car and Mr. Esderts did this same thing that he did here and they were—he held on some way or the other and they were all thrown off this car. Would there be any question about our liability for that? No, there wouldn't and we wouldn't take a case like that to court because—

Mr. Dooley: I object to that.

The Court: Objection sustained. It is hypothetical. Objection sustained.

Mr. Rush: There is no question about the liability in a case like that. Why? Because the operator of the motor car was negligent and we would have been responsible for that." (Supp. Abst. 49, 50)

This argument is improper for the following well-defined reasons:

(1) Contributory negligence is not a defense to an action under the Federal Employers' Liability Act (45 U.S.C., sec. 51), but this argument made it such.

(2) An action under this statute is not predicated on *respondeat superior* but is a direct action against the railroad for violation of a duty to the employee, including a duty to furnish a safe place to work. (See *Lillie* v. *Thompson,* 332 U.S. 459, a criminal assault by a third person upon an employee.) Moreover, Peet's right of recovery, if this were his lawsuit, would not depend on Esdert's conduct.

(3) The action was not by Peet, nor any son of the jurors working for the Rock Island. To associate the jurors or their families with Peet's position is improper.

(4) Whether the railroad would take a case of a given nature to court is not an issue and is recognized as improper.

The argument, when analyzed, cannot be defended.

The question of venue was, of course, a question of law and could not be argued as a matter to be determined by the jury. More important, however, the other objectionable matter meant that whether the plaintiff could recover depended upon the manner in which decedent operated the motor car. Not only is this contrary to the Act itself, but avoids the responsibility of the carrier for direct negligence.

The railroad would be responsible for failure to furnish Esderts with a safe place to work. And whether the place was safe would be determined by the condition of the derail, the weeds and all the surrounding circumstances. See *Shenker* v. *B. & O. R.R. Co.*, 374 U.S. 1.

Moreover, the uncontradicted evidence of a safer derail device and a safer method of warning would be an evidentiary basis for a verdict.(*) See *Margevich* v. *C. & N.W. Ry. Co.*, 1 Ill. App. 2d 162, 167, Petition for Leave to Appeal, denied 2 Ill. 2d 631, Cert. denied 348 U.S. 861; *Boston & Maine R.* v. *Michigan*, 156 Fed. 2d 109; and *Palum* v. *Lehigh Valley R. Co.*, 165 Fed. 2d 3.

The Illinois Supreme Court in *People* v. *Weinstein*, 35 Ill. 2d 467, 470, 471, recently reversed a judgment solely upon the basis that the law had been improperly portrayed in final arguments. And this notwithstanding the absence of an objection by the adverse party. Certainly, if Illinois courts—and all state courts—are to properly

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(*) Witnesses testified for petitioner that it was not customary on other railroads to set a derail at such a great distance (216) feet from a switch, and testified to the use by other railroads of warning lights at the switch which indicate that a derail is set, and of automatic derail devices controlled by the throwing of the switch (Abst. 63-69; 82-85).

discharge their responsibilities under the act, they must apply the same principles to litigation arising under this Federal Statute.

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO REVIEW THE OPINION OF THE INTERMEDIATE COURT.

Plaintiff's petition for leave to appeal from this opinion of the Illinois Appellate Court to the Illinois Supreme Court came to that court in November, 1966, when there were two vacancies.

Article VI, Section 4 of the Constitution of Illinois provides that the Supreme Court shall consist of seven judges. Moreover, it further provides that in order to obtain leave for appeal, the concurrence of four judges of the Supreme Court is necessary.

In applying for leave to appeal to a court which has a constitutional consist of seven judges at a time when the court has but five judges, a litigant would have to obtain the concurrence of 80% of the court in order to have his petition for leave to appeal allowed. If the court were made up of its constitutional consist of seven, a simple majority, or 57% would be adequate for that court to review the case.

Clearly, this action of the Illinois Supreme Court at a time when it is composed of but five judges and the concurrence of four being necessary to a decision is in violation of petitioner's rights to due process of law and that of receiving equal protection of the law under the United States Constitution, Amendments V and XIV.

It is also in contravention of petitioner's right to due process of law under the Illinois State Constitution, Ar-

ticle II, Section 2, and constitutes a violation of Article 2, Section 19 of said constitution.

In addition, Article VI of the Illinois Constitution under which the Supreme Court was created is in violation of the Fifth and Fourteenth Amendments to the United States Constitution in that a litigant whose petition is before the Court when vacancies exist will not have the same consideration as one before the Court when its constitutional consist of seven justices exists.

This is what befell petitioner here.

CONCLUSION.

The decision of this Court in *Rogers* and subsequent decisions have made uniform the function of the trial court in directing a verdict. To warn trial and Courts of Review that the rights under this Statute encompass an orderly and fair trial, not merely the question of either directing or setting aside a verdict, this court is respectfully asked to grant certiorari in this important ease and to reverse the judgment of the Appellate Court of Illinois, First District, which became final by the Illinois Supreme Court's denial of petitioner's petition for leave to appeal.

Respectfully submitted,

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APPENDIX TO PETITION.

Colloquy Between Court and Counsel After Jury Retired to Deliberate.

(Abstract Pages 182-198)

(Discussion in chambers outside the presence and hearing of the jury between court and counsel.)

Mr. Dooley: If Your Honor please, with reference to these exhibits, Defendant's Exhibit 4 and Defendant's Exhibit 11—

The Court: Those are the statements of Peet?

Mr. Dooley: That's right. An impeaching document does not go to the jury room. For many years the Civil Practice Act and its antecedents have provided that papers read or received in evidence other than depositions may be carried from the bar by the jury. This is the same provision we are operating under now. It goes back to about 1907, and under that particular provision it is held that a written statement of a witness used to impeach does not go to a jury room and that it is reversible error to allow them to go to the jury room. As a matter of fact, counsel should have read the impeachng portion of the statement to the jury after introducing it, but I will just give the Court the cases: *Janson* v. *N. K. Fairbank Co.*, 156 Ill. App.

The Court: Were those cases in which it had been read to the jury? Introduced into evidence and read to the jury?

Mr. Dooley: I don't know, but—

Mr. Rush: You know, there are some other circumstances.

Mr. Dooley: You can never send an impeaching statement to the jury room. It is the thirteenth juror. He should

(Colloquy Between Court and Counsel)

have read it in evidence, the impeaching portion. There are some conclusions in there which was the portion I didn't read.

Mr. Rush: Now, let's review the record on this very statement. As I remember, as to the later statement he denied ever giving that first one and he said that it was not his statement. Now, that is something else we had put into evidence, showing that it was. When I introduced that statement in evidence in front of the jury Mr. Dooley says to me—I said, "Do you object?" He says, "How about the previous statement, are you offering that?" He said that before the jury and I said, "Well, do you object to this one?' He said three times, "How about the previous statement," before the jury. If you remember, in his argument he starts reading this statement. I said at that time, "Do you intend to read it all? I object." I said, "Do you intend to read the entire statement to the jury?" He said, "Yes." I said, "If you do, I have no objection."

Lo and behold, he goes through the statement and reads all but about the last quarter of it and then stops. Now, I say that under these circumstances, Judge, that it should go to the jury. You have that discretion and particularly under these facts where he put me on the spot before the jury.

Mr. Dooley: I didn't put you on the spot.

Mr. Rush: No you didn't? You said, "Where is the previous statement."

Mr. Dooley: You should have read the statement.

The Court: How did that eventually end? I mean, the colloquy between you and counsel?

Mr. Rush: It ended up, Judge, that the jury was out and both statements were admitted.

(Colloquy Between Court and Counsel)

The Court: But there was no objection?

Mr. Rush: No.

Mr. Dooley: The admission of a statement in evidence is an entirely different subject than a—I was asking if he wasn't going to read them.

The Court: I grant you that the admission of it is entirely different.

Mr. Dooley: Here is the thing he read. What he should have done is after the statement had been identified he should have read it to the jury.

The Court: The entire statement, because the entire statement had been admitted in evidence. The entire statements were offered and the entire statements were received and there was no objection. There was no limitation to certain matters in the statement which might be claimed as impeaching. There is no reference to any other matters. The entire statement was offered. The entire statement was received. You used it advantageously, Mr. Dooley, I would say in corroboration of your witness.

Mr. Dooley: Judge, you always—

The Court: Now, let's get over to the other point. Your proposition is that the whole purpose of these statements was that they were impeaching?

Mr. Dooley: Certainly. That is the way he identified them and cross examined the witness.

The Court: Under no circumstances may statements which are of an impeaching character go to the jury. That is your proposition?

Mr. Dooley: That's right, and in fact, in one of them there is an expression of an opinion or a conclusion as to whether the track had anything to do with it and that was the section I didn't read. Now, as I understand it, the law

(Colloquy Between Court and Counsel)

concerning the use of impeaching statements is laid down by *Illinois Central Railroad Co.* v. *Wade,* 206 Ill. The proper method is to have the witness identify his signature and ask him if it is in the same condition. You have then laid the foundation for the impeaching statement.

The Court: For the introduction. I agree with you.

Mr. Dooley: Both of these were used as impeaching documents here. I will just read the Court this case:

> "The Court was also in error confounding the rule as to the foundation to be laid to authorize the admission of impeaching statements of a witness with the foundation necessary to justify the offer to introduce statements made in writing and signed by the witness when—
>
> "I will just read it.
>
> "—it is desired to impeach a witness by proof of oral statement made by him out of court contradictory upon a material point of his testimony given from the witness stand. It is requisite that a foundation for the introduction of such oral statements be made by asking the witness if he did not at a given time and place in the presence of specified persons make the supposed contradictory statements, that where the supposed contradictory statements were reduced to writing by the witness or signed by him a sufficient foundation for the introduction of the writing is laid by showing the paper to the witness and allowing him to inspect it and read it if he desires and proving by himself or others that the signature there is the genuine signature." Citing cases—

Mr. Rush: Can the other matter go in, Judge? Here is this jury starting to deliberate. I would like to have the exhibits go in to them. Can we send everything?

(Colloquy Between Court and Counsel)

The Court: Yes. Get the rest of the other exhibits, the instructions, and so forth.

Mr. Rush: I offered Defendant's Exhibit 11 in evidence before the jury. Mr. Dooley said, "How about the previous statement?" I said, "Are you objecting to 11?" He said, "How about the previous statements?"

Mr. Dooley: Charlie, you are objecting to it. I couldn't object to it when the guy said it is his signature.

Mr. Rush: I am offering it in evidence.

Mr. Dooley: That is always done.

Mr. Rush: The Judge said, "Do you object." You said in front of the jury. "How about the previous statement."

The Court: Of course, he had no right to.

Mr. Rush: Then I am put on the spot. I look like I am holding something back.

The Court: You should have offered it.

Mr. Rush: I did.

The Court: I should have ruled upon it. If there was an objection I should have ruled upon it.

Mr. Rush: There was no objection. Both of these things went into evidence.

The Court: As far as I am concerned, so far as these two instruments are concerned and the legal validity—I will say regularity. When I say regularity, certainly they didn't go into evidence in the ordinary, usual and customary fashion, but as to there being properly in evidence, under the circumstances here, I have no quarrel and I am not concerned with that. Now, the question is, they being in evidence and they not having been read to the jury—Ordinarily, of course, when you establish your portion of the case you would have read—of course, you would have read the entire instrument because there was no limitation to

(Colloquy Between Court and Counsel)

it. You would have read both of these on the basis of if they were impeaching.

Mr. Dooley: I said something. I said something about, "Are you going to read them."

Mr. Rush: The jury was out then.

Mr. Dooley: I brought that up this morning.

The Court: Actually, I assumed that it was an oversight.

Mr. Rush: Judge, don't forget he put me on the spot before the jury by asking for that statement like I was holding something back. You said you were going to read the entire statement to the jury and you didn't do it and the Judge then said, "That will go into evidence. They can read it."

The Court: At that time, of course, there was no question in my mind that it was in evidence and not having been read to the jury, that, of course, it would go to the jury. Otherwise, the jury would not know what was in the thing. Something that was admitted into evidence with no objection.

Mr. Dooley: Well, of course, the fact that it is admitted into evidence as an impeaching document, whether there was an objection or whether there wasn't an objection, it doesn't mean that—

Mr. Rush: It was admitted into evidence because you asked me to put it in.

The Court: Let me ask you this, in any of the cases that you have cited was there a failure to read the alleged impeaching statement to the jury?

Mr. Dooley: Judge, I don't know, but that is their problem, not mine. It is their document. It is their exhibit and I can't try their lawsuit. I mean, I am serious.

(Colloquy Between Court and Counsel)

Mr. Rush: You make a demand on me to offer it in evidence and—

Mr. Dooley: You were checking your exhibits. I said, "What about the other one," when you showed them.

Mr. Rush: You said you objected to this one. You said, "How about the other one." I said, "All right, I will offer the other one too." Then they both went into evidence without any objection.

Mr. Dooley: Let me read a few cases.

It couldn't be competent.

Mr. Rush: Why didn't you object to it at the time I offered it in its entirety and there was no objection. It was at your request.

The Court: Let's see the end of that thing.

Mr. Dooley: It is never offered in its entirety and you read from it.

Mr. Rush: Otherwise, I would have objected to you reading just corroborating parts of it. You just take it and start reading corroborating parts and I said, "Are you going to read the entire statement? If you do, I have no objection." Then you announce, "I am going to read the entire statement to the jury."

Mr. Dooley: Well, this is a conclusion.

Mr. Rush: That is what you said.

Mr. Dooley: Wait a minute. First of all you examined and cross examined this witness at length about Defendant's Exhibit 4. You cross examined him at length about it.

The Court: So far as I am concerned I have got to decide this one way or the other.

Mr. Dooley: Can I give you these cases, Judge?

The Court: Give me any cases in which—

(Colloquy Between Court and Counsel)

Mr. Dooley: Judge, I don't know. I will just give you the law on this. It is just cold. You can't send a statement to the jury room. It is the thirteenth juror. Let me read the cases.

The Court: I understand that to be the rule that impeaching statements, certainly, ordinarily when they are received in evidence they are read to the jury and do not go to the jury room with the jury.

Mr. Dooley: Furthermore, Your Honor, there are conclusions in there.

The Court: That, of course, is the ordinary rule.

Mr. Dooley: There are conclusions in there.

Mr. Rush: May the record show that the jury has just requested these particular statements, noting their absence from the other exhibits that went in.

Mr. Dooley: I can't help it if they did that, because I asked before the argument when we raised this question of whether or not I could have those documents the Court said that I couldn't. Anything not in evidence and at that time I alluded to these statements. You made a big to-do about the records.

Mr. Rush: They are not in evidence.

The Court: At the time that you alluded to that there was a remark on the record. I distinctly recall it. Mr. Rush said, "Well, they are in evidence," and you will find that the Court said, "Yes, they are in evidence," and then you proceeded to read from them.

They were in evidence and they being in evidence, you could read them.

Mr. Dooley: I expected him to read from it in his argument. I expected him to read the impeaching statements in his argument since he hadn't read it during the trial.

(Colloquy Between Court and Counsel)

In fact, I brought that point up before the arguments. I expected him to read it. Now, here you want to send him out with something because he didn't read it. I can't help that.

The Court: You have got a serious problem here.

Mr. Dooley: I mean, you send it out. It is cold. It is cold error.

Mr. Rush: It is not error. In the particular facts of this case, a Judge has some discretion under these particular facts.

Mr. Dooley: There is no discretion in these cases.

Mr. Rush: Jim, you put me on the spot before the jury by asking me to offer that.

Mr. Dooley: I didn't put you on any spot. I asked you if you were offering it in evidence. You have to offer it in evidence before you can read any part of it, even the impeaching section.

Mr. Rush: Well, then you say you are going to read the entire statement and on that basis and then you go through it picking out every bit of corroborating stuff in there and after you read each statement you say, "Isn't that just what he told you? Isn't that just what he told you? Isn't that just what he told you?"

Mr. Dooley: Here is the conclusion where he said, "I don't think the track had anything to do with it."

Mr. Rush: The particular problem we are in at the moment is caused by Mr. Dooley announcing in his argument he would read the entire statement and not doing it.

Mr. Dooley: No. No.

Mr. Rush: You did that, Jim.

The Court: Supposing he hadn't referred to this at all in his argument?

(Colloquy Between Court and Counsel)

Mr. Dooley: You would still have the same question.

The Court: How can you impeach a person and how can you go through it without a follow-up once you ask. You have him identify his signature and apparently a jury would gather it contained an impeaching statement and if you never read that to the jury and if it is not given to the jury to see, then aren't you in the situation that has been criticized before, failure to follow-up?

Mr. Dooley: He had to offer that document in evidence, Defendant's Exhibit 4, after the cross examination of the man.

The Court: He couldn't offer at that time.

Mr. Dooley: I know. I didn't mean at that time.

The Court: The only thing he could do is have it identified, particularizing and pointing out that portion he claims was impeaching and then offer it in his turn.

Mr. Rush: Well, the problem we are in here is that those being railroad statements the jury thinks the railroad is holding them back. That is going to prejudice us on the thing. You can't consider just one thing with reference to this problem. You have to consider the whole chain of events as to these statements.

Mr. Dooley: Charlie, there isn't anything I did which caused this.

The Court: All right, these will go to the jury.

Mr. Dooley: Don't you want to hear these cases?

The Court: Not now. We are going to have to decide this. Later.

Mr. Dooley: This is something here. We have gone on here for two weeks. I didn't do anything to cause these to go to the jury room. I didn't do anything. He offered them. He should have read them. We didn't do anything here. It would be a serious error to prejudice the plaintiff by these.

(Colloquy Between Court and Counsel)

The Court: It is going to be a serious question either way.

Mr. Dooley: Would you give me two minutes and let me read these cases?

Mr. Rush: None of these apply to this situation.

The Court: There is no question about the general principle.

Mr. Dooley: Here is what the cases say, though.

The Court: I know what the cases say, Jim.

Mr. Dooley: They say it is lending a thirteenth juror to send such a statement to the jury room.

The Court: I recognize that.

Mr. Dooley: It would be very much like sending to the jury room an unsworn deposition of a witness taken ex parte. That is just what they say and it has been held reversible error. There are cases here from 156 to 317, App.

The Court: In any of those cases was there a failure to read to the jury—I would assume that all of those cases—

Mr. Dooley: No. Get me these cases, 156 App.

The Court: (Continuing) —in all those cases that they were read to the jury.

Mr. Dooley: 156, 170, App. 317 App. 315, Ill.

The Court: There are many instances where the law distinguishes the matter of handling exhibits. Generally, one is that they are introduced, that they are read into the record and become a part of the record and don't go to the jury.

Mr. Dooley: Well now, this man is the principal witness.

Mr. Rush: I say that every moment we delay here is prejudicial to the defendant.

(Colloquy Between Court and Counsel)

Mr. Dooley: You created it.

Mr. Rush: You did.

Mr. Dooley: I didn't create it.

The Court: What I am trying to do is to avoid error here. There are several things that occur to me and I don't —I want to say this and I will say it on the record. I don't wonder but what the jury is looking for this statement after the Court's statement, which was beneficial to you that they would. You were objecting that he hadn't read it all. I was pointing out to the jury that they themselves could read it all.

Mr. Dooley: Look at the position that puts me in because there is a conclusion there which wouldn't—

The Court: The other position.

Mr. Dooley: I mean, I asked about these statements being read when he put on his defense at the end.

The Court: How many cases have you got? Give me one. What is your citation, 206, Ill.?

Mr. Dooley: That is not it, Judge. That is the one on— let's see.

The Court: Much of this would never have gone to the jury at all, because it is full of conclusions. I am not concerned with that at this time, because they went in without objection.

Mr. Dooley: Yes, but the statement always goes in without objection except when he singles out—when he starts to read—

The Court: Look, I know where I am.

Mr. Dooley: In that 206, they say the proper thing to do is to introduce the entire document and then read—

The Court: To introduce—

Mr. Dooley: (Continuing) —the entire document.

(Colloquy Between Court and Counsel)

The Court: And read the whole document.

Mr. Dooley: No, and read the impeaching part.

Mr. Rush: You read everything that is corroborating in it. That is okay, after you announce that you are going to read the whole thing. I would have objected.

(Discussion off the record.)

The Court: I think that the situation that we find ourselves in here is quite clear on the record. Is there any objection to recalling the jury at this time and reading these exhibits to the jury and not sending them to the jury room?

Mr. Dooley: What do you mean, the impeaching portions, Judge?

The Court: No. Inasmuch as they are both in evidence, reading the entire documents to the jury.

Mr. Dooley: Well, of course parts of them are improper.

The Court: Yes, and you read from much of it that was improper.

Mr. Dooley: I didn't read any conclusions.

The Court: Look, Jim. You can't have your cake and eat it too. The best way I know now, as a practical matter, and after all both of you gentlemen—I don't know the result here. You have got a lot of time and effort and money invested in this. It would be the Court's suggestion, and I know it can only be done by stipulation and agreement, that the jury be recalled. I would explain to the jury that through inadvertence that these two exhibits had not been read to them and they would now be read to them.

Mr. Rush: I have no objection.

Mr. Dooley: Well, look at this sentence.

The Court: A lot of them are horrible, Jim.

(Colloquy Between Court and Counsel)

Mr. Dooley: Listen, I read everything except down to here. I read everything of this except down to the word, "work."

The Court: What are you referring to now?

Mr. Dooley: Defendant's Exhibit 4, "The receiving track is a regular yard track, but the track itself was not the cause of our derail."

The Court: Well, the track itself, of course it wasn't. It is not contested that it was. There is no contention the track caused it. The contention is it was the condition surrounding the track. You are helped as much as you are hurt by that. Isn't that what you said all the way through? Of course, you failed to bring out the very important thing that there was no mention at all one way or the other in reference to weeds, or anything of that nature.

Mr. Dooley: They didn't ask him.

The Court: Apparently, they didn't ask him, but you forgot that in your argument. That was an oversight, I am sure. It wasn't intentional.

What do you say, Jim?

Mr. Rush: I feel, Your Honor, they should go into the jury room under the circumstances here, especially in view of what went on in the final argument. The jury right now thinks that the defendant is holding something back.

Mr. Dooley: I will be willing to—You see, this gives these things such an awful accent, you know, after the jury has retired.

The Court: Well, actually there is not a lot there that hasn't been read to them.

Mr. Rush: I don't think that there is any question about 11 going in where he denies that this is his statement.

(Colloquy Between Court and Counsel)

Mr. Dooley: Charlie, going to the jury room is something besides being—

Mr. Rush: These are something else. These are impeaching portions.

Mr. Dooley: Didn't you read this in evidence? Didn't you read this in your argument.

Mr. Rush: No.

Mr. Dooley: Well, I read it.

Mr. Rush: You read part of it.

Mr. Dooley: I read this whole thing.

Mr. Rush: No, you didn't. You read nothing about the photographs.

Mr. Dooley: Pictures, I read.

Mr. Rush: No, you didn't.

Mr. Dooley: Didn't I? Didn't I read down to here? (Indicating.)

Mr. Rush: You didn't use the word, "pictures."

Mr. Dooley: Well, here. I wouldn't want this paragraph, this sentence in because—

The Court: Which? "The receiving track is a regular yard track."

Mr. Dooley: Yes, because that was my impression.

The Court: So we are clear on the record here, can it be sustained and agreed that Defendant's Exhibit 4A can be now read to the jury in its entirety with the exception of the paragraph being the fourth paragraph of the statement? The fourth paragraph from the end appearing on page three? Can we stipulate to that?

Mr. Dooley: Now, tell me, what are the mechanics of this?

The Court: I would propose, gentlemen, if you have no objection, to the Court reading it.

(Colloquy Between Court and Counsel)

Mr. Dooley: Well, I would suggest—I know I wouldn't want either counsel to participate.

The Court: I will call them in. I will tell them that through inadvertence, I will inform them that certain statements would have accompanied them to the jury room, however, in lieu thereof I was reading these statements to the jury.

Mr. Dooley: Yes.

Mr. Rush: And you will read the entire statement?

The Court: I will read the entire statement without exception.

(Whereupon the jury was recalled at the hour of 6:20 o'clock P.M.)

(In open court in the presence and hearing of the jury the statements were read.)

Opinion of the Appellate Court of Illinois

Mr. Justice Dempsey Delivered The Opinion Of The Court.

The administratrix of the estate of William J. Esderts, brought this action against the defendant, Chicago Rock Island & Pacific Railroad Company, based upon the Federal Employers' Liability Act (45 U.S.C.A. §51, et. seq.). The jury returned a verdict in the defendant's favor, judgment was entered thereon and the plaintiff appeals.

The plaintiff contends that she was deprived of a fair trial because improper procedure was followed in the use of impeaching statements in the cross-examination of one of the plaintiff's witnesses, because the trial court recalled the jury after proofs were closed and read these statements to the jury, and because of prejudicial argument by the defendant.

William Esderts was the foreman of a bridge-repair crew employed by the defendant. The crew had spent a few weeks in Iowa Falls, Iowa, repairing a bridge and were using three railroad cars for their headquarters, one of which was their bunk car. The three cars were on a switch track just south of the railroad's single-track main line which ran east and west through Iowa Falls. There were other switch tracks to the north of the main line. The bridge was on the main line three-quarters of a mile west of the bunk car.

In the late afternoon on June 5, 1952, Esderts, who had been employed by the railroad for nearly 20 years, Wilbur Peet, a young man and a new employee, and another employee who was also doing the cooking for the crew, left

the bridge by a motor car, which ran on the railroad tracks, and rode to the bunk car so that Peet could fill out some papers required for his employment and the other employee could prepare the evening meal. They traveled eastward over the main line and upon reaching the bunk car the motor car was removed from the main line so that it would be out of the way of an expected passenger train; it was placed on the switch track to the south but it was not turned around. The front end was still facing east and the rear end was to the west.

The motor car was a small flat car which could carry four men. The men would sit sideways on the platform of the car, two on one side and two on the other, back to back, facing away from the tracks on which the car rode. There were footboards for their feet and there was a canvas windbreak on the front end of the car. The operating levers were in the center of the platform and the man who ran the car would turn his body at an angle so that he could see ahead and reach the levers with that hand which was toward the inside of the car.

After Peet had completed his forms, Esderts and he reboarded the car to pick up the rest of the crew at the bridge. Peet sat on the south side with his body turned towards the west, the direction in which the car was to go; he was leaning against the metal bars which supported the windbreak which was to the east and back of him. Esderts sat on the north side of the car with his upper body and face turned to the west and his right hand operating the controls behind his back. They then proceeded westward on the switch track, the car being run backwards contrary to the rules of the railroad.

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The switch track entered the main line some distance to the west. 216 feet east of where the junction took place there was a derail device located on the south rail of the switch track. This was a safety device, the principal purpose of which was to prevent cars on the switch track from entering the main line and colliding with passenger or other trains. The derail would reflect cars to the south and away from the main line. Derails were painted yellow and there were such devices on all the switch tracks of the defendant railroad. The rules of the railroad required the devices to be set for their intended purpose. The derails were locked to the tracks and had to be unlocked by hand to permit movement of cars onto main tracks. The railroad rules required track foremen to watch the derails and to reset them if they were in a wrong position. The derail on the south switch track was locked and Esderts had a key for it.

As the motor car went westward at five to eight miles per hour, an eastbound switch engine on a track north of the main line passed by. Peet turned his head to the right and waved to a man on the engine. Esderts and the foreman of a switch crew waved to each other too. A moment later the motor car struck the derail and was hurled from the tracks. Esderts was flung off backwards and the car landed on top of him. Peet, who was thrown clear, removed the car from Esderts, who, while in obvious pain, was not unconscious. Other railroad men working in the yard came to help, a doctor was called and Esderts was taken to a hospital where he died the next day.

Although there was little dispute as to the manner in which the accident occurred, there were disputes concerning the scene of the accident. There was a warning sign

on a four or five foot high post located about six feet south of the derail. The post had the word "DERAIL" painted vertically on its east and west sides. One dispute concerned the legibility of this sign, whether it needed painting and whether it was obscured by weeds. Another dispute pertained to the visibility of the derail device, whether it was painted yellow or whether it was the same rusty color as the rail. Still other disputes concerned the weeds between the rails of the switch track, the weeds to the south of the track and the presence of debris between the rails and in the general area. All these issues, which the jury resolved favorably to the defendant, were pertinent under the plaintiff's complaint which alleged that the defendant had carelessly and negligently:

a. maintained, operated and controlled a certain track and derail device in such a manner as to create a dangerous and hazardous condition to railroad employees required to use the track;
b. failed to provide plaintiff's decedent with a safe place to work;
c. permitted weeds, grass and foreign growth to accumulate around the derail device so as to obscure the presence of the device from plaintiff's decedent;
d. failed to post adequate signs or otherwise to warn plaintiff's decedent of the presence of the device;
e. allowed and permitted a certain derail device to remain in close proximity to a passing truck and in a concealed location so as to create a hazard and trap for railroad employees using said track.

The Federal Employers' Liability Act provides that a railroad will be liable for any injury or death to an

employee of such carrier resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. The Act further provides that contributory negligence on the part of the injured employee will not bar the action, but the damages will merely be diminished by the jury in proportion to the amount of negligence attributable to such employee.

It is our opinion from reading the entire record that it was not unreasonable for the jury to reach the conclusion that it did. The evidence, although in conflict, was sufficient for the jury to find that no negligence of the railroad contributed wholly or partially to Esderts' injury and death. The plaintiff contends, however, that the jury's verdict was improperly influenced by errors which took place during the trial, and that these errors were compounded by the prejudicial argument of the defendant's counsel.

The alleged trial errors pertain to the defendant's use and the trial court's treatment of post-accident statements signed by Wilbur Peet who was the only person who saw the accident and who testified as a witness for the plaintiff. The errors charged are many and the principal ones pertaining to the defendant's use of statements are these: the entire statements were introduced into evidence, read to the jury and used as substantive, not impeaching evidence; the portions of the statements which may have been impeaching were never offered in evidence; Peet was questioned on irrelevant matters for which there was no basis for impeachment and was in-

terrogated for the deliberate purpose of impeaching him; the whole intent in the cross-examination of Peet was to generate the impression that his testimony was contradictory to his statements and to put him and the plaintiff in a bad light in the eyes of the jury; the defendant succeeded in this purpose by the questions it asked, by the way it asked them and by causing the plaintiff to object to them, and that the defendant's mode of handling the statements prevented the plaintiff from challenging their impeachment character and from offering explanatory or rebuttal evidence. The errors laid at the door of the trial judge are the following: telling the jury that the full statements would be given to them and ruling that the statements would go to the jury room; recalling the jury after they had commenced deliberating and reading the statements to the jury himself, and creating an unfair dilemma for the plaintiff by ruling that the complete statements would go to the jury room unless the plaintiff agreed to his reading them to the jury. Although this truncated list of errors appears formidable, it becomes less so when the errors are evaluated in conjunction with what actually took place at the trial.

For a better understanding of the errors alleged and the trial developments, a resume of relevant parts of Peet's testimony and statements is advisable. Peet testified that Esderts did not wave to anyone when the switch engine passed by, that the speed of their motor car was approximately five miles per hour, that the derail device looked just like the track, that weeds between the tracks were eight to twelve inches high, that the derail sign was fourteen feet south of the track, had little

paint on it, was not over four feet high and that the top of the post could not have been more than six inches above the weeds. During his cross-examination Peet was questioned about three signed statements. The first was made by him the day after the accident, June 6, 1952, and was marked defendant's exhibit #4. This exhibit was three pages in length and, except for three sentences, was fully corroborative of his testimony. These sentences were: "I do not know if my Foreman waved * * * or not," "* * * we were traveling in my judgment about 7 or 8 miles an hour. * * *" and "* * * the track itself was not the cause of our derailment." The second statement was made four days later, June 10, 1952, and was marked defendant's exhibit #12. It was in question and answer form and three of the questions and answers were these:

"Q. Did Foreman Esderts wave at the fireman on the switch engine?

A. I did not see him wave * * * I did not see Bill wave.

Q. How fast were you moving when you struck this derail?

A. About seven or eight miles an hour.

Q. Was there anything to obstruct the view of either the derail or the derail sign from your position on the motor car?

A. The sun was shining in my eyes and I didn't see it."

The third was made five years later, October 10, 1956, and was marked defendant's exhibit #11. It consisted of two paragraphs. In it Peet said that he had no recollection of the derail or sign being painted or weeds being

cut following the accident. Pictures of the scene (which were subsequently introduced in evidence at the trial) were shown to him when the statement was taken and he said the pictures "show the conditions as they were at the time of the accident."

With this background we can now relate what took place at the trial. After Peet identified his signature on exhibit 4 the plaintiff objected to any questions concerning the contents of the statement on the ground that a signed statement, for which the proper foundation had been laid, could only be used for impeachment purposes during the defendant's side of the case when it could be introduced in evidence and the impeaching portions read to the jury. The court sustained the objection. Later on in cross-examination the defendant's attorney with exhibit 4 in hand, asked Peet three or four times if it was true that he did not know whether or not Esderts waved. As each question was asked the plaintiff repeated the objection that a wrong method was being used to impeach from a signed statement. The form of the last question was changed and Peet answered that he was quite certain that Esderts did not wave. Only two other questions which might have been founded on exhibit 4 were asked the witness: one was about the speed of the motor car and the other was about the time intervening between Peet's waving to the switch engine and striking of the derail; objections to these questions were sustained.

After being shown exhibit 11 Peet said it was not his statement but that it bore his signature. The defense attorney started to ask a question about the exhibit and the plaintiff's attorney objected before the question was completed. The objection was on the ground that the

witness could not be impeached by showing that he did make the statement or on any collateral or immaterial matter. A discussion took place in chambers during which the statement was shown to the attorney who thereupon withdrew his objection. The defendant, however, asked no further question of the witness based on the statement. However, he was asked questions, without objection, concerning subjects covered in the statement. He said that following the accident the position of the derail sign had been changed and the whole yard had been cleaned. He was also shown pictures of the scene, presumably the same ones shown him at the time he made the statement.

Peet was also questioned about exhibit 12 and the inquiry was made whether the questions and answers, which we mentioned heretofore, were asked and answered as set forth in the statement. Although exhibit 12 was a signed statement the plaintiff did not repeat his general objection. A specific objection was made to the question: "Was there anything to obstruct the view of either the derail or the derail sign from your position on the motor car?" for the reason that it was not impeaching. The objection was overruled. No objection was made to the other two questions. The witness replied that he was not sure he had made the answers as they were written. The person who took the statement testified that the questions had been asked and the answers given as set out in the exhibit.

At the conclusion of the defendant's case only exhibit 12 was offered in evidence. In the presence of the jury the plaintiff asked: "What about the other statement?" and "I am asking you what about the statement you had

him identify and laid a foundation for." The defendant then offered exhibit 11. The plaintiff persisted, "But where is the statement which you had marked for identification which Mr. Peet signed on June 6, 1952?" The jury was excused. The attorney for the plaintiff pursued his inquiry and twice stated that he would offer exhibit 4 if the defendant did not. The defendant finally offered it and it was received in evidence. The defendant, however, did not read into evidence the impeaching portions of exhibit 4 or of exhibit 11.

During his final argument the defendant's attorney referred to exhibit 4 two times but did not read from it; he told the jurors that it was in evidence and that they would have the opportunity to read it. In his closing argument the plaintiff's attorney said that since the defendant had not read the statement he would do so. The defendant stated that he had no objection if the entire statement was read; the plaintiff replied that he intended to read the statement completely. As he read it he interspersed frequent observations that the statement substantiated Peet's testimony. He read all of the statement except the last five sentences which included the one about the switch track itself not being the cause of the derailment. The defendant protested the omission. The court responded that the statement was in evidence and the jury could read it in its entirety in the jury room.

In his final argument the defendant's attorney referred to exhibit 11, which he said the jury would see in the jury room, and called attention to what Peet had said in his statement. The plaintiff's attorney also talked about the statement and he read that portion of it wherein Peet said that he knew nothing of painting being done

or weeds being cut following the accident. He did not read the part wherein Peet stated that the defendant's pictures showed the conditions as they were at the time of the accident.

Exhibit 12 was also referred to in the defendant's final argument, and the questions asked of Peet and the answers made by him in that statement were repeated. The plaintiff in rejoinder only mentioned the question and answer concerning Esderts' waving to the switch engine.

After the jury had been instructed and had retired, the attorney for the plaintiff objected to exhibits 4 and 11 going to the jury room because they were impeaching documents. The court reminded him that he had used exhibit 4 advantageously in corroboration of his own witness. The defendant's attorney argued that exhibit 4 had been offered at the insistence of the plaintiff, whose inquiry about the statement "put him on the spot" before the jury and made him appear like he was "holding something back," that the full statement had not been read and that the jury, having heard the parts favorable to the plaintiff, should see the entire statement. The plaintiff replied that the problem was created by the defendant's failure to read the impeaching portions of the statement after introducing it and that to permit the statement to go to the jury would be reversible error. The plaintiff made an additional objection to exhibit 11: that in cross-examining Peet the defendant had gone beyond the scope of the direct examination and had asked him questions solely for the purpose of impeaching him.

During the heated discussion on both exhibits the situation was further complicated by a bailiff informing

the court that the jury was asking for the exhibits. The court stated the exhibits would go to the jury. The plaintiff's attorney renewed his protest and the discussion continued. Cases were cited and read. The court remarked that he was not surprised that the jurors were looking for the statements after his telling them that they would have the statements to read. The court said that he was trying to avoid error and he proposed a solution: recalling the jury, reading the entire statements to them and not sending the statements to the jury room. He said it was a practical solution of the difficulty but that it could be done only by stipulation. The defendant's attorney agreed to the proposal but still contended that under the circumstances that had developed the exhibits should go to the jury room. The plaintiff's attorney voiced misgivings and advanced two objections: one was to the reading of that part of exhibit 4 about the switch track itself not being the cause of the derailment, and the second was that he did not want either counsel to participate in the reading. The judge suggested that he himself would read the exhibits but would not read the sentence objected to in exhibit 4. The plaintiff's attorney then agreed. The jurors were recalled and the judge told them that through inadvertence they had been told that the statements would accompany them to the jury room, that this could not be done and in lieu of this he would read the statements to them. He did so with the exception of that part of exhibit 4 previously objected to by the plaintiff's attorney.

The defendant and the plaintiff must share responsibility for the irregular proceedings. The defendant was at fault in not following through with the impeachment

process on exhibits 4 and 11 after the court sustained the plaintiff's objections to the method of impeachment being pursued by the defendant. There was a basis in law for the objections. It has been held that when it is desired to impeach a witness by a statement written or signed by him, and the proper foundation has been laid by permitting the witness to read the statement and proving by him or others that he wrote it himself, or that what he said was reduced to writing and was signed by him, the statement should be introduced into evidence during the cross examiner's case and the portions contradictory to the witness' testimony read to the jury. *I.C. R.R. Co.* v. *Wade,* 206 Ill. 523, 69 N.E. 565 (1904); *Hapke* v. *Brandon,* 343 Ill. App. 524, 99 N.E. 2d 636 (1951). In the *Wade* case one of the parties sought to use written statements in this manner and the trial court would not permit it. The Appellate Court affirmed but the Supreme Court reversed holding that the course of proof pursued by the appellant was proper. In the *Brandon* case the trial court refused to admit into evidence written statements made by a witness inconsistent with his testimony. In reversing, the Appellate Court said that since the correct foundation had been laid it was proper to offer the inconsistent parts of the statements in evidence with other testimony on behalf of the appellant. We agree with the trial court in the present case that this is a proper method of using a written statement for impeachment purposes but we disagree that this is the only way it can be used. After the correct foundation has been laid a witness may be asked on cross examination if he said this or that (quoting from the statement) and if he denies the contradictions or says he was misquoted

or the like, the follow-up proof may be the same as in the case of an oral statement, a deposition or prior testimony. If the witness admits having made the inconsistent statements a party is not foreclosed from making further proof, for it has been held that the party may prefer to have these statements more clearly brought out and emphasized. *People* v. *Williams*, 22 Ill. 2d 498, 177 N.E. 2d 100 (1961). *Contra*: *Sally Chain Stores, Inc.* v. *Ace Bonded Carriers, Inc.*, 307 Ill. App. 644, 650, 30 N.E. 2d 966, 969 (1940). In the present case the trial court's ruling may have disconcerted the defendant; the cross examination of Peet on exhibits 4 and 11 was curtailed and the full statements were offered in evidence reluctantly. But having started to impeach on these exhibits the defendant was at fault in not completing the impeachment even though the preliminary questions had not been fully answered. The defendant also was at fault in telling the jurors that they would have the statements in the jury room.

However, the plaintiff was not prejudiced because of these faults, in fact they redounded to the plaintiff's advantage. After prodding the defendant into introducing exhibit 4 under the threat of doing so if the defendant did not, the plaintiff attorney capitalized on the defendant's failure to read the inconsistent parts of the statement and read most all of the statement himself. He read it because it was favorable to his client and repetitive of Peet's direct testimony. So too with exhibit 11. What he read to the jury, with one exception, was corroborative of Peet's testimony on cross examination. He thus succeeded in repeating to the jury the testimony

of his major witness through the use of statements that were otherwise inadmissible. As he stated in the plaintiff's brief: "His [Peet's] statements were exactly what he had testified to on direct examination."

The plaintiff complains that the entire statements were admitted into evidence, but she was more eager than the defendant that they be offered and received. She complains that the statements were read to the jury, but her counsel read the greater part of them himself and used them as substantive evidence in support of her case. She complains, on the one hand, that the impeaching portions of the statements were not read to the jury by the defendant and complains, on the other hand, that they were read by the court. As a matter of fact, her counsel read most of these himself. Of the three items in exhibit 4 which might be considered in conflict with Peet's testimony one (the track not causing the derailment) was never asked of Peet; and the other two (the speed of the motor car and whether Esderts waved) were read by the plaintiff as well as the court. Moreover, the last two items were in evidence, long before exhibit 4 was read, through the medium of exhibit 12. Of the two conflicting items in exhibit 11 one (the weeds being cut after the accident) was read by both court and plaintiff; the second item (relative to the pictures correctly depicting the scene) was read by the court only. However, these pictures were in evidence and had been shown to Peet while he was on the witness stand. Because he said he did not know if they were the same ones he had seen when he made the statement, proof that they were identical was made by one of the persons present at the time

he signed the statement. The repetition by the court could not have been seriously harmful to the plaintiff.

The plaintiff complains that she was precluded from challenging the impeaching character of the items in exhibits 4 and 11 and from offering explanatory evidence concerning them. But there was no offer of proof in this regard and, furthermore, she neither challenged nor offered rebuttal explanation to those questions and answers in exhibit 12 which were identical to the ones in exhibits 4 and 11. She complains that the defendant's inept use of Peet's statements generated an impression that his testimony and statements were in complete conflict and that the necessary objections made by her counsel deepened this impression. If this was true her counsel's disclosure of the contents of the statements and the court's re-reading of them dissipated the impression. She complains of those questions asked by the defendant prefaced by the phrase, "Is this a true statement?" (which was the form of the question used when the first attempt was made to impeach Peet by referring to exhibit 4) but the court sustained every objection to these questions.

The plaintiff complains that prejudicial error occurred when the court permitted the defendant to question Peet about refusing to give a statement on October 10, 1957. This arose when Peet said that representatives of the defendant asked for a statement on that date but he had refused to make one. The plaintiff cites *Deeke* v. *Steffke Freight Co.*, 50 Ill. App. 2d 1, 199 N.E. 2d 442 (1964), in support of her contention. The *Deeke* case is not in point. In that case a defense witness declined to give a statement to the plaintiff. The plaintiff contended that his

cross examination as to this fact was unduly limited. The Appellate Court affirmed saying that a witness, at his discretion, has the right to refuse to talk to anyone. Unlike the witness in the *Deeke* case, Peet gave a statement but denied giving it. It was not error to question him about this, and to show that he was mistaken in saying he did not give a statement.

The plaintiff complains that the trial court permitted the defendant to improperly cross examine Peet for the sole purpose of impeaching him about matters not covered in his direct examination, such as whether the defendant changed the conditions at the scene subsequent to the accident by cleaning up debris, cutting weeds and painting the derail and the derail sign. It is improper to examine a witness on immaterial matters for the purpose of contradicting his answers (*People* v. *Kirkwood,* 17 Ill. 2d 23, 160 N.E. 2d 766 (1959)), but, in the first place, the plaintiff made no objection to these questions and, in the second place, not all of Peet's answers were inconsistent with his statements in exhibit 11, the exhibit upon which he was being examined. The latter view was shared by the plaintiff's attorney who, as he read this exhibit to the jury commented: "That is just what the boy said."

The plaintiff further complains that the defendant sought to impeach Peet when there was no basis for the impeachment. Peet was asked (referring to exhibit 12): "Was this question put to you and did you make this answer at that time:

> " 'Q. Was there anything to obstruct the view of either the derail or the derail sign from your position on the motor car?

A. The sun was shining in my eyes and I didn't see it.' "

The court overruled the objection that the answer was not inconsistent with Peet's testimony. The court's ruling was correct. Although Peet had testified that the sun obstructed his view he also testified that the derail was the same color as the track, that the sign was almost unpainted and was not more than six inches above the surrounding weeds. If these conditions prevailed at the time of the accident it is likely that he would have said so four days later when he was asked if anything obstructed his view of the derail or the sign. If a witness fails to mention facts under circumstances which make it reasonably probable that he would mention them if true, the omission may be shown as an indirect inconsistency. *Carroll* v. *Krause,* 295 Ill. App. 552, 15 N.E. 2d 323 (1938); Cleary, *Handbook of Illinois Evidence,* 2nd ed., sec. 9.7.

The plaintiff complains that the trial court informed the jury that they would have exhibits 4 and 11 in the jury room and that he stated, in chambers, after the case had gone to the jury that the exhibits would go to the jury. The plaintiff argues that impeaching documents cannot be taken to the jury room. *Nordhaus* v. *Marek,* 317 Ill. App. 351, 45 N.E. 2d 993 (1943); *Nelson* v. *Northwestern Elevated R. Co.,* 170 Ill. App. 119 (1912). We agree with the plaintiff that the judge was mistaken when he made these statements but the plaintiff was not harmed by the mistakes because the documents did not go to the jury.

The plaintiff complains that the judge recalled the jury and read the statements to them. This is not a just complaint because her counsel stipulated that this could be done. Also unjustified is the complaint that the stipulation was forced on her counsel. The court did not confront her counsel with a "Hobson's choice" as is argued here. There was no ultimatum that the statements would go to the jury unless he agreed to the court's reading them. Rather, the record indicates that the court was persuaded by the attorney that it would be error to send them to the jury. After the court said that they would go to the jury room he asked to see the cases the plaintiff was citing. It was after the cases had been read that the court suggested the solution. The plaintiff and the defendant agreed to the suggestion which resolved a difficult situation and which was a fair solution to the procedural snarl for which they, more than the court, were responsible.

The plaintiff's final complaint is that the defendant's argument was prejudicial. Once again, an understanding of this complaint necessitates recounting the background of the argument and the context of the allegedly prejudicial remark. As we have mentioned there was a dispute whether the derail warning sign was obscured by weeds growing in its vicinity. A witness for the plaintiff described these weeds as perennials, three to four feet tall, which were there from the year before, he said they were hemp weeds the tops of which break off for the winter but the stalks remain standing. The defendant presented a professor of botany from Iowa State University who was shown photographs taken the day after the

accident of the area near the derail sign; he said the weeds visible in the picture were not hemp, that hemp was an annual weed which grows from seed each spring, that the plant that made up the bulk of the discernible vegetation was an annual which when full grown would not reach a maximum height of more than 18 inches. In discussing these witnesses the attorney for the defendant remarked that the plaintiff's witness had said:

> "* * * that there were weeds four feet high around there. Four to four and a half feet high. He said that he never saw the derail and then he went further than that and I asked him what kind of weeds those were and he said, 'hemp weeds,' and to make it a little better he said they were second year growth. You could see where they had come out from the stalks and he said, 'You know, in the winter,' he said, 'just the tips fall off. Just the tips fall off, and then they grow out.' That is when we brought this professor in from Iowa, the botany man at Iowa, because that just isn't so.
>
> "He couldn't identify all the weeds in there because this is the early spring, June 5th, mind you, when most growth starts in May. This is June 5th, and he told you that most of these things hadn't progressed to the point where they are even identifiable. Some of them he could identify, but he did say there was no hemp in there.
>
> "In other words, certain things you can recognize. Certain growths, you cannot. You might not be able to say what they are and he told you there wasn't any hemp in there.

"He said more than that. Hemp does not do that, does not grow from a stalk. He said that different hemp weeds come up from the ground each year. Now, you aren't going to get four feet, four and a half foot growth of any weed by June 5th.

"You know, this happened out there in Iowa and people in that area know the conditions there much better than we do. If the plaintiff in this case had a lawyer out there in Iowa you couldn't convince any group of residents around that area that there would be any four and a half foot weed growth."

The plaintiff's attorney objected to the last remark. The court sustained the objection and instructed the jury to disregard the statement. The defendant went on:

"You are asked to do that. You are asked to believe that there would be such a growth in this case."

The court sustained a second objection, struck the defendant's remark and again instructed the jury to disregard it.

The plaintiff sees in these remarks a reflection on the propriety of her bringing her cause of action in the courts of Cook County and engaging a Chicago lawyer. She argues that she had a right under the law to have her case tried in Cook County and that the defendant should not have questioned this right before the jury, and that the right "could not be diluted by a plea of the jurors that the action was brought in Cook County since Iowa residents would not believe certain facts." We believe the plaintiff's apprehensions are magnified beyond reason. The defendant's argument concerned Iowa weeds.

While the remark about an Iowa lawyer was improper and the assertion that Iowa residents would know how high weeds would be in early June went beyond the evidence, the comments were relatively innocuous and the court promptly struck them and told the jury not to consider them. Even if the jury drew the farfetched inferences from the comments that the plaintiff does the court's decisive ruling removed any resulting injury. The plaintiff also complains of another part of the defendant's argument but we believe there is no merit to her complaint.

There was a solid evidentiary basis for the jury's verdict and neither the trial involvements nor the procedural deviation, nor the defendant's final argument deprived the plaintiff of a fair trial. The judgment of the Circuit Court is affirmed.

Affirmed.

SULLIVAN, P.J., and SCHWARTZ, J., concur.

Mandate will issue only on request of attorney
See Sec. 88 C.P.A. and App. Ct. Rule 10.

SUPREME COURT, U. S.

FILED

MAR 24 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1121

LENA ESDERTS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM J. ESDERTS, DECEASED,

Petitioner,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED.

No recurring questions of construction or application of the Federal Employers' Liability Act are involved; the petitioner is complaining solely about trial court rulings concerning state law of evidence and procedure in general. The only basic question presented is: Should this Court review the upholding of a jury verdict in a routine and insignificant FELA case simply because it was in the defendant's favor?

STATEMENT OF THE CASE.

The petitioner's statement is inaccurate, confusing and incomplete. Respondent accordingly amplifies:

Petitioner's decedent, Esderts, lost his life when the motor car he was operating struck a derail and overturned.

All receiving, delivery and storage tracks on the Rock Island leading into a main line are equipped with a derail device to protect the main line (Abstract 93, 137; Record 482). The same is true in the railroad industry throughout the United States (Abstract 86). Government rules require that every derail must be kept in the closed position (Abstract 93; Rule 245, Abstract 78-79). Each derail has a lock for this purpose (Abstract 93).

The decedent, Esderts, became a Rock Island bridge and building foreman in 1952 and had been assistant foreman before that (Abstract 180). Esderts knew the rules and had his own personal key to the derail lock (Abstract 156, Record 698; Abstract 93, 108). Esderts and his repair crew started to work on the bridge in March, 1952 (Abstract 155).

On June 5 of that year, at about quitting time, Esderts and Peet, a member of the crew, left the crew's bunk car and started out to the bridge to pick up the crew on the customary motor car (Abstract 30). The motor car was not then on the main line, but on one of the service tracks (Abstract 30).

The switch foreman, who was about three tracks over from the motor car, waved as it passed him; he testified that Esderts waved to him (Abstract 170, 164, 169). The accident happened almost immediately thereafter (Abstract 31); the car was diverted from the track when it struck a derail which was in its usual and proper locked position (Abstract 95). The derail was yellow in color

(Abstract 136, 149, 159, 164-165, 167) and the motor car at the time of the accident was being operated backwards by Esderts in violation of Safety Rule 161 (Abstract 37, 158).*

The derail sign was *not* obscured by weeds (Abstract 94, 96, 137, 165); it *could* be read very plainly (Abstract 165); its lettering *was* legible (Abstract 149, 131, 136, 159, 160, 165); and it was *not* freshly painted the day following the accident (Abstract 96, 136, 162, 105).

Petitioner twice mistakenly asserts that the derail sign was painted the day after the accident (Petition, page 6). Not only is this conclusively disproved by the testimony cited above, but the very witness upon whom petitioner relies flatly stated, "It was not freshly painted on June 6, 1952" (Abstract 14). His further testimony, "On June 6 the post was painted . . ." (Abstract 14), understood in its proper context, meant simply that on that date it was not an *unpainted* post, but one that had been painted at some earlier time.

Similarly unsupported by the record is petitioner's assertion that the weeds were cut that same following day (Abstract 98, 139, 160, 159). Photographs taken the day following the accident conclusively show no fresh painting and no fresh cutting of weeds (Abstract 15-16, 131-132, 165, 97, 160).

The statements of the witness Peet (Defendant's Exhibits 4 and 11) were offered and admitted into evidence during the trial, even before petitioner offered rebuttal evidence (Additional Abstract 14-16; Appellate Court's

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* Petitioner incorrectly insists (Petition, pages 5-6) that the Appellate Court misstated these facts.

Opinion, Petition pages 9a-10a).* Further, petitioner's attorney stated that if respondent did not offer Exhibit 4, he would do so. After respondent offered it, petitioner's attorney stated he had no objection (Additional Abstract 16-17). In fact, in his closing argument he read this exhibit to the jury (Supplemental Abstract 56-61), interpolating his reading with the comment, "This is just what he said, isn't it?" (Supplemental Abstract 57-59). The Appellate Court accordingly found that petitioner was not prejudiced (Petition, pages 14a-15a).

The record, set out in the Appendix to the petition, shows without contradiction that petitioner's counsel agreed to the court reading Exhibits 4 and 11 to the jury (Petition, pages 35-36), and the Appellate Court so found (Petition, pages 12a, 19a). That court also held that not only was petitioner not confronted with a choice of two errors (as the petition argues) but that, in fact, the procedure suggested by the trial court was "a fair solution" to which both parties agreed (Petition, page 19a).

REASONS FOR DENYING THE WRIT.

This is a common garden FELA case that is limited solely to its own peculiar and non-recurring facts. It presents no questions of interpretation or application of the Federal Employers' Liability Act and is of no general importance or interest. The only questions raised relate solely to state procedure and evidence.

Moreover, there is clearly no conflict with the decisions of this Court or any other court. In fact, the decision

* Petitioner's statements that they were not "admitted into evidence during the course of the trial" (Petition, page 6) and were "never introduced in evidence until after final arguments" (Petition, page 13) are patent misstatements. That part of the record showing their admission was omitted from both petitioner's Abstract and Supplemental Abstract. Respondent was forced to file an Additional Abstract.

below conforms fully with this Court's explicit admonition in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, that it is the jury's function to determine the factual question of liability. The judgment on the jury's verdict, the Appellate Court's affirmance, and the Illinois Supreme Court's refusal to grant leave to appeal were correct and there is no warrant for further review here.

I.

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957), this Court specifically recognized that Congress vested the function of decision in FELA cases solely in the jury; thus (at page 510):

> ". . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury . . ."

The Court was equally explicit that a jury could find against liability; for, in that case, in setting aside the state Supreme Court's reversal of a verdict for the plaintiff on the ground that plaintiff's evidence did not support the finding of defendant's liability, this Court said (at page 504):

> "We interpret the foregoing to mean that the Missouri court found as a matter of law that the petitioner's conduct was the sole cause of his mishap . . .
>
> "We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make . . ."

Here, the jury made the decision and this Court should deny certiorari as it did in precisely the same circum-

stances in *Hullum* v. *St. Louis Southwestern Ry. Co.*, 384 S. W. 2d 163 (Tex. Civ. App., 1964) (certiorari denied 382 U. S. 906; rehearing denied 382 U. S. 949). In the *Hullum* case a jury verdict for the defendant was affirmed on appeal; the state appellate court declared (pages 172-173):

> "... *This decision* [*the Rogers case*] *is thought to be applicable to the right of the employer as well as to the right of the employee.* Certiorari was denied in each of the following cases where the employee sought to overturn an adverse jury verdict ..." [citing 8 cases.]
>
> "In *Tennant* v. *Peoria & P. U. R. R.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, the Supreme Court in a F. E. L. A. case said:
>
> > 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'
>
> * * * * *
>
> "We hasten to add, however, that we have had occasion to review all of the evidence in the case and have concluded that the findings of the jury are not so against the weight and preponderance of the evidence as to be manifestly wrong and unjust." (Emphasis added.)

Similarly, in the instant case the Appellate Court reviewed the record and concluded:

> "It is our opinion from reading the entire record that it was not unreasonable for the jury to reach the conclusion that it did. The evidence, although in conflict, was sufficient for the jury to find that no negligence of the railroad contributed wholly or partially to Esderts' injury and death ..." (Petition, page 5a).
>
> "There was a solid evidentiary basis for the jury's verdict and neither the trial involvements nor the procedural deviation, nor the defendant's final argument deprived the plaintiff of a fair trial. The judg-

ment of the Circuit Court is affirmed." (Petition, page 22a).

In reviewing the record, the court was but exercising its proper function under *Lavender* v. *Kurn*, 327 U. S. 645 (1946). In that case, this Court, speaking of a jury's verdict, said at page 653:

> "... Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."*

Here, whatever conflict there may have been in the testimony was resolved by the jury in defendant's favor. Since there was an evidentiary basis for that verdict, it would have been "an undue invasion of the jury's historic function" for the Illinois Appellate Court "to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury" (*Lavender* v. *Kurn*, 327 U. S. at 652-653).

II.

Petitioner's claims of erroneous procedural rulings are without substance:

A.

When the trial court initially stated that the two statements of the witness Peet (Defendant's Exhibits 4 and 11) would go to the jury, plaintiff made *no* objection (Supple-

* This holding was reiterated and reconfirmed in *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U. S. 208, 210 (1963).

mental Abstract, page 60). Second, they did not go to the jury; but if they had it would not have been error under the Illinois authorities. Plaintiff's statement to the contrary (Petition, page 11) is simply not true.

People v. *Somerville,* 71 Ill. App. 2d 381, 219 N. E. 2d 116 (1966), (leave to appeal denied, 34 Ill. 2d 630) is conclusive. It is there said at pages 388-389:

> "Defendants' next contention is that it was reversible error to permit the jury to take a copy of Arnold's statement to the jury room during their deliberations. In *People* v. *Allen,* 17 Ill. 2d 55, 160 N. E. 2d 818, our Supreme Court held that where the defendant failed to object in the trial court to the taking of exhibits to the jury room, that error was waived for purposes of appeal. 17 Ill. 2d at 62. The Court went on to hold:
>
> > It is well established that the matter of whether exhibits should be taken to the jury room is within the sound discretion of the trial judge and his ruling will not be disturbed unless there was an abuse of such discretion to the prejudice of defendant. (*People* v. *Ciucci,* 8 Ill. 2d 619.) We are of the opinion that no such abuse of discretion of prejuddice is shown here. (17 Ill. 2d at 62, 63.)
>
> While it may not have been necessary to have Arnold's statement read to the jury after he had orally testified to its contents, or to permit the statement to be taken to the jury room, we hold that it was not an abuse of discretion to do so, and that the defendants were not prejudiced thereby."

The same was held in *Valant* v. *Metropolitan Life Insurance Company,* 312 Ill. App. 262, 38 N. E. 2d 369 (Case No. 41844 Abst. decision 1941).

But even if the Illinois rule were otherwise, the procedure of sending exhibits to the jury is purely a question of local practice and differs from state to state.* This issue clearly

* See Annotation in 57 ALR 2d 1011—"Propriety and effect of jury in civil case taking depositions to jury room during deliberations"; Century Digest System, Evidence, Section 307(3).

has no far-reaching application or effect and is manifestly not one that warrants plenary review by this Court.

B.

Equally without merit are petitioner's additional claims that the trial court erred in failing to assess the impeaching quality of Peet's statements and to allow petitioner to offer rebuttal evidence (Petition, pages 12-13). The Appellate Court recognized that there were inconsistencies between Peet's testimony and his statements but that petitioner made no effort to explain or rebut them (Petition, pages 18a, 16a).

The claim that impeaching evidence was allowed to be treated as substantive evidence is ludicrous, because petitioner herself used the statements *as substantive evidence* in her *own* behalf and read them to the jury at length (Petition, page 15a; Supplemental Abstract, pages 56-61).

III.

Petitioner also objects to a portion of respondent's argument to the jury as prejudicial, principally because, she says, respondent's counsel twice repeated an objectionable statement after an objection had been sustained (Petition, pages 13-15). This is not true; petitioner's plaint of impropriety and prejudice is a misrepresentation of the record.

A reading of the quoted excerpt shows that, while the court did sustain the objection to the statement that Iowa residents would not believe petitioner's claim that the weeds were four and a half feet high (Supplemental Abstract 30-31), no objection was made to the statement that the jury was being asked to believe that the weeds had attained that height by early June (Supplemental Abstract 31). The court's final ruling (Supplemental Abstract 31) related

back to, and ordered stricken, only the *earlier* statement referring to what Iowa natives would believe; it did not refer to what petitioner wanted the jury to believe. Obviously, it did not because it was proper argument.*

IV.

Petitioner's final argument (Petition, pages 19-20) of a deprivation of constitutional rights because, at the time the petition for leave to appeal was denied, two vacancies existed on the Supreme Court of Illinois is plainly frivolous. The same argument was presented by petitioner to the Supreme Court of Illinois in a motion for rehearing and was denied by the *full* court of seven Justices after the vacancies had been filled. Moreover, if petitioner's argument were accepted, then all decisions of the Illinois Supreme Court, of this Court and other courts during similar periods of unfilled vacancies would be subject to attack.

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* Petitioner's other contentions—that this argument was the injection of a question of law before the jury, *i.e.*, a question of venue, and that it was improper to argue that respondent would have been liable solely because of Esdert's action if a third party (or Peet) had been injured—are patently without merit. The Appellate Court rightfully rejected petitioner's interpretation of the facts and the law as to both. The court characterized petitioner's inferences as to the first "farfetched" and her apprehensions as "magnified beyond reason" (Petition, pages 21a-22a). As to the second, respondent could be liable to a third person (or Peet) only because of Esdert's action; it was the *sole* cause of the accident. The jury weighed the evidence, found for respondent and the Appellate Court affirmed, holding there was no merit to petitioner's contention (Petition, page 22a).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

MAR 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1121

LENA ESDERTS, Administratrix of the Estate of WILLIAM J. ESDERTS, Deceased,

Petitioner,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The real issue in this case involves the function of the court and jury in an action under the Federal Employers' Liability Act. Can a railroad worker bringing an action in the state court be deprived of that type of

trial which this Court has mandated by the failure of the state court to adhere to its criteria governing other trials in actions at law within the state? The errors were described by the Intermediate Appellate Court as "truncated",[1]

This Court has held that the Federal rights created by it must be given uniform application in Federal courts as well as state courts, and that whenever a state opens its court to a plaintiff seeking to enforce these federally created rights, it must give that plaintiff "the full scope of these rights". (*Garrett* v. *Moore-McCormack,* 317 U.S. 239, 244, 245, 249; *Brown* v. *Western R. of Ala.,* 338 U.S. 294, 296.)

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[1] "The errors laid at the door of the trial judge are the following: telling the jury that the full statements would be given to them and ruling that the statements would go to the jury room; recalling the jury after they had commenced deliberating and reading the statements to the jury himself, and creating an unfair dilemma for the plaintiff by ruling that the complete statements would go to the jury room unless plaintiff agreed to his reading them to the jury. Although this truncated list of errors appears formidable, it becomes less so when the errors are evaluated in conjunction with what actually took place at the trial." (App. Ct. Opinion, p. 6a Pet.)

* Respondent claims petitioner "mistakenly" refers to the derail sign being painted after the occurrence and weeds being cut thereafter. We refer to the cross examination of its section foreman: "The derails were painted as well as the switch targets on June 6, 1952. I knew they needed painting. * * * Every work that I do, there is a record of. There is no record of cutting the weeds before this occurrence. In June and July, the weeds were mowed after the accident." (Abstract 14)

Certainly a litigant can be just as effectively deprived of his right to a jury trial by the method of conduct of the trial as by the direction of a verdict. This Court must recognize that a fair trial is an integral part of the Act itself. Serious trial errors uncountenanced in other actions at law in the state courts can be the vehicle of deprivation of this important right. Thus, for a trial court to intervene on behalf of the respondent, which failed to introduce during the time of reception of evidence the contents of the statements admitted solely for the purpose of impeaching and to confront petitioner's counsel with the "Hobson's choice" of either sending the statements to the jury room or recalling the jury from their deliberation and reading the statements to them is hardly the function of a court in an action of this character as outlined by this Court in the *Rogers* case. (*Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500)

So too, respondent does not undertake to justify its jury argument, indulged in over the objection of petitioner, concerning the forum of the action as well as the erroneous statements concerning contributory negligence and respondeat superior, the latter doctrine having no application whatsoever in an action of this character.

A statement admitted in evidence does not mean that the entire document is before the jury. Only the impeaching portions of out-of-court statements admitted for the purpose of impeachment are to be read to the jury during the reception of evidence. This the Appellate Court recognized in noting that the respondent was at fault in not introducing the impeaching portions and in likewise telling the jurors that they did have the statements

in their jury room. Yet it compounded the error of the trial court.(*)

Again, it is not denied that the statements admitted for the purpose of impeaching a witness do not go to the jury room.

When respondent states that petitioner did not object to the statements going to the jury room, it is neglecting the hard fact of the record. The Appendix to the Petition (P. 21) contains the objections by petitioner concerning these documents going to the jury room. This occurred when the exhibits were sought to be sent to the jury room. It was then that the question arose and therefore the only proper time to object.

(*) "The defendant was at fault in not following through with the impeachment process on exhibits 4 and 11 after the court sustained the plaintiff's objections to the method of impeachment being pursued by the defendant. There was a basis in law for the objections. It has been held that when it is desired to impeach a witness by a statement written or signed by him, and the proper foundation has been laid by permitting the witness to read the statement and proving by him or others that he wrote it himself, or that what he said was reduced to writing and was signed by him, the statement should be introduced into evidence during the cross examiner's case and the portions contradictory to the witness' testimony read to the jury. *I.C. R.R. Co.* v. *Wade,* 206 Ill. App. 523, 69 N.E 565 (1904); *Hapke* v *Brandon,* 343 Ill. App. 524, 99 N.E. 2d 636 (1951)." (App. Ct. Opinion, pp. 12a, 13a Pet.)

"But having stated to impeach these exhibits the defendant was at fault in not completing the impeachment even though the preliminary questions had not been fully answered. The defendant also was at fault in telling the jurors that they would have the statements in the jury room." (App. Ct. Opinion, p. 14a Pet.)

Nor is it any answer to state that the Illinois rule prohibiting impeaching statements to go to the jury room is a question of local practice and may differ in other states. Certainly, Illinois courts must regard an action under this statute just as it would any other action at law and cannot make rules applicable only to actions under FELA.

Obviously, petitioner was deprived of rebutting any impeaching matters in the statements. During the introduction of evidence, as the Appellate Court pointed out, it was incumbent upon the respondent to offer in evidence those parts of the statements it contended were impeaching. It did not. The proofs were closed. Hence, there was no necessity to offer any evidence concerning the contents of the statements or to go into the circumstances under which they were obtained.

We might note that petitioner never referred to the statements in his opening argument at the close of the case, but respondent in its final argument read to the jury contents never received in evidence over specific objections of petitioner. (Abstract 32, 35). These objections were overruled. It was in his closing argument that petitioner's counsel read other parts of the statements eluded to by respondent. What we have said concerning respondent's closing arguments has not been answered.

The Proceedings in the Illinois Supreme Court.

Nor has respondent correctly apprised the Court of the proceedings in the Illinois Supreme Court. That Court denied plaintiff's petition for leave to appeal from the judgment of the Appellate Court at the November Term when it had but 5 judges and not the constitutional requirement

of 7 and at a time when under the Illinois Constitution the affirmative vote of 4 judges was necessary to obtain admission of the case to the Supreme Court (Article 6, Constitution of Illinois, Ill. Rev. Stat. Vol. 1, p. 18).

Plaintiff, at the January Term, moved the Court to vacate the order denying her petition for leave to appeal and to have a full complement of the Court act upon the petition, but the Illinois Supreme Court denied the motion to vacate the order denying the petition for leave to appeal and to allow the entire court to pass upon it. Obviously the Illinois Supreme Court never reached the petition for leave to appeal, since it denied the motion to vacate its order denying the petition. Obviously, the plaintiff did not have the full scope of the federally created rights in his state court action. (*Garrett* v. *Moore-McCormack*, 317 U.S. 239, 244, 245, 249; *Brown* v. *Western R. of Ala.*, 338 U.S. 294, 296).(*) So, also, this constituted a violation of the concept of equal protection. This Court in *Bolling* v. *Sharp*, 347 U.S. 497 (1954) held that although the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment, the concepts of equal protection and due process are not mutually exclusive.

(*) The Illinois Supreme Court cannot, as does this Court under certain circumstances, change the number of affirmative votes necessary to obtain the allowance of the petition for leave to appeal.

CONCLUSION.

We respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Illinois ought to be granted and on the granting of said petition, the judgment reversed.

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